FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 1

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, TRUSTEE IN THE MATTER OF F. O. MORGAN SHIPPER CONSTRUCTION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

INDEX

101391—38——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 248–250) is unreported.

JURISDICTION

The final order and decree of the District Court was entered on June 18, 1938 (R. 200–202). Petition for appeal was filed June 29, 1938 (R. 204) and allowed June 30, 1938 (R. 208). The order of June 18, 1938, has been stayed pending determination of

the cause by this Court. On October 10, 1938, this Court noted probable jurisdiction and postponed consideration of the motion to dismiss or affirm to the merits.

Jurisdiction of this Court is conferred by section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Title 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether, in a suit to set aside an order of the Secretary of Agriculture establishing, pursuant to the Packers and Stockyards Act, maximum rates to be charged by market agencies, a determination by this Court that such order is invalid for the reason that the hearing before the Secretary was defective, requires the court below to direct immediate distribution to the market agencies of funds impounded by order of the court, representing the excess of the charges collected by the market agencies over and above the charges found to be reasonable by the Secretary.

2. Whether, in such case, distribution of the impounded funds must be stayed for a reasonable period sufficient to permit the Secretary by resuming the proceeding to correct the defect therein and to enter a reconsidered order determining the proper

charges for the period during which the funds were impounded, and thereby to establish to whom such funds should be paid.

STATUTE INVOLVED

The pertinent title of the Packers and Stockyards Act, 1921 (42 Stat. 159, 7 U. S. C., c. 9, 181–229), is reprinted in Appendix A, *infra*, pp. 78–90

STATEMENT

This appeal arises in connection with fifty individual suits, consolidated by stipulation of the parties for the purpose of trial and other proceedings (R. 169), which were brought in the United States District Court for the Western District of Missouri to suspend, enjoin, set aside, and annul an order made by the Secretary of Agriculture on June 14, 1933, prescribing maximum rates to be charged by market agencies at the Kansas City stock yards (R. 18–95). The order was made by the Secretary in a proceeding instituted under the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159, 7 U. S. C., c. 9, Sections 181–229) by order of April 7, 1930 (R. 21). The suits were commenced in the District Court on July 19, 1933 (R. 1). On July 22, 1933, the District Court entered a temporary restraining order (R. 129) conditioned upon the impounding, in the registry of the court, of the excess of the rates and charges collected by petitioners (appellees here) over and above the rates

and charges found to be reasonable by the Secretary of Agriculture in his order of June 14, 1933. The funds so impounded aggregated approximately $580,000 on November 1, 1937, on which date impounding ceased because a new schedule of rates agreed upon by the Secretary and the market agencies thereupon became effective. The pertinent provisions of the restraining order follow (R. 130):

> Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

After the entry of the impounding order, the District Court proceeded to hear the cause, and, on October 29, 1934, rendered its decision upholding the Secretary's order and dismissing the bills of complaint (R. 230–237). The market agencies (appellees here) prosecuted an appeal to this Court, which, on May 25, 1936, reversed the District Court's decree and remanded the cases for further proceedings. *Morgan* v. *United States*,

298 U. S. 468. The District Court thereupon reheard the cases and again upheld the Secretary's order and dismissed the bills of complaint (R. 241–246). From this decision appellees prosecuted a second appeal and, on April 25, 1938, this Court rendered an opinion reversing the decree of the District Court. *Morgan* v. *United States,* 304 U. S. 1. The Court found that the Secretary had failed to grant the full hearing contemplated by the statute but refrained from passing judgment upon the merits of the order.

The United States and the Secretary of Agriculture (the appellants here) requested a rehearing on the ground, among others, that important questions as to the distribution of moneys impounded in the custody of the District Court remained undetermined. The market agencies, on the other hand, asserted that this Court by its decision on April 25, 1938, had held that the impounded funds belonged to the appellees and should forthwith be released to them. This Court denied rehearing, on May 31, 1938, and its *per curiam* opinion indicated that the controverted question as to the distribution of the impounded funds was to be considered in further proceedings. 304 U. S. 23, 26.

On June 2, 1938, the Secretary of Agriculture issued an order (R. 187–188) reopening the proceeding in which the controverted order of June 14, 1933, was entered, with a view to correcting the procedural irregularity and determining whether

or to what extent the order of June 14, 1933, should be corrected, after according to the appellees the procedural rights to which this Court had held them to be entitled.

Whereupon, the appellants, on June 11, 1938, made a motion in the District Court (R. 184–186) to have all further proceedings stayed and the Clerk of the District Court directed to retain the funds impounded until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. The District Court denied the motion (R. 250) and on June 18, 1938, entered an order directing that the funds be distributed to appellees (R. 200–202). It is this order from which the present appeal is taken.

On the same date that the District Court entered the order and decree from which appellants have appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement (R. 203–204). In that decree, however, the District Court retained jurisdiction so that—

> such other proceedings [may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain * * *.

This decree left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

An order allowing appeal from the order of June 18, 1938, was entered by the District Court on June 30, 1938 (R. 208). On the same day, however, the District Court denied without opinion appellants' motion for an order staying the enforcement of the order of June 18, 1938, pending the appeal to this Court.[1] Appellants thereafter applied for such a stay and a supersedeas to Associate Justice Butler, who referred the application to the Court and, pending a decision by the Court on the application, stayed and superseded the order of the District Court. On October 10, 1938, this Court stayed and superseded the order pending determination of the cause by this Court.

The Secretary's order (R. 187–188) of June 2, 1938, provided, *inter alia,* that "the Proceedings, Findings of Fact, Conclusion, and Order" as issued on June 14, 1933, be served upon appellees herein as the tentative findings of fact, conclusion, and order, and that appellees be given 30 days in which to file exceptions thereto and in which to make any appropriate motions or objections with respect to further proceedings. At appellees' request this time was subsequently extended to August 15, 1938.

[1] This order has been omitted in printing the record. See Index, R. ii.

On June 30, 1938, appellees moved to vacate the Secretary's order of June 2, 1938, on several grounds. On August 15, 1938, the appellees filed (1) an affidavit of bias and prejudice, (2) an affidavit as to changed conditions since closing of evidence, (3) exceptions to the tentative findings of fact, conclusion, and order, (4) a statement objecting to the procedure and rulings of the examiner in the prior hearing, and (5) further motions and objections with respect to the Secretary's order of June 2, 1938.

The Secretary, on August 26, 1938, issued an opinion dealing with the motions and affidavits referred to above.[2] After stating that some of the issues would be reserved for decision at a later stage, the Secretary denied the motion to vacate and denied the appellees' motion to disqualify himself for bias and prejudice, but granted the motion to appoint an examiner to hear further evidence relating to conditions subsequent to June 14, 1933. The order issued concurrently with the opinion directed the examiner to hear argument on the exceptions prior to the taking of additional testimony, and after taking such testimony to prepare and submit to the parties a report in accordance with the rules of practice. The hearing thereby ordered was, after notice, opened in Washington, D. C., on September 12, 1938, and, after argument

---

[2] The Secretary's opinion is reprinted in Appendix B, *infra*, pp. 91–99. A certified copy has been filed with the Clerk of this Court.

of exceptions and introduction of evidence by appellees, was adjourned until October 3, 1938, at Kansas City, Missouri, at which time all parties who had not appeared in Washington were to be given an opportunity to appear and present evidence. No additional parties appeared at the hearing of October 3, 1938, and, after introduction of affidavits of service, the proceeding was adjourned until further notice.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

1. In denying appellants' motion requesting said court to enter an order staying all further proceedings herein and to direct the Clerk of said court to retain in his custody the moneys impounded in said court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 2, 1938, and such final order shall have become of competent jurisdiction.

2. In granting appellees' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said court between July 24, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said court on July 22, 1933, and extended from time to time thereafter.

3. In holding that as a matter of law the funds now impounded in the custody of the Clerk belong to appellees.

4. In holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to appellees.

5. In holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. In directing the distribution to appellees of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the court of the ultimate ownership of said moneys.

7. In directing the distribution to appellees of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the court of the reasonableness of the rates and charges under which the said moneys were collected by appellees from their patrons.

SUMMARY OF ARGUMENT

I

The Packers and Stockyards Act provides that all rates and charges for the furnishing of stockyard services shall be just, reasonable, and nondiscriminatory. Procedural machinery implements this basic requirement, but the positive duty to charge only reasonable rates is not conditioned by the validity of the procedural steps which may be taken to compel compliance with the Act. Appellees bore when this case was commenced and bear now after five years of litigation the statutory duty of charging and of having charged their patrons only reasonable rates. In view of the clear mandate of the Act, no disposition of this case can be made which does not determine whether the rates which appellees actually charged met the statutory requirements. Because the fund now impounded in the District Court was created by payments which represent the excess over a schedule of rates the reasonableness of which has never been judicially denied (and twice has been sustained), the farmers who made those payments obviously have an interest in the impounded fund and a right to insist, through appellants, that no disposition of the fund be made which would prejudice the rights that the Act confers on them.

MICROCARD 22

TRADE MARK ®

MICROCARD® EDITIONS, INC.
PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

II

The right of the farmers to insist that the impounded fund be distributed on the basis of its true ownership cannot be defeated on the ground that reparation proceedings have heretofore been available or are now available as an adequate remedy for the recovery of charges claimed to have been excessive. For the Secretary to have made an award of reparation prior to the date his order was set aside would have required him not only to impeach that order, then under review, by assuming that it would not be enforced or obeyed, but to anticipate the decision of the court impeaching it. Moreover there is no basis upon which the farmers could heretofore have sought or could now seek reparation. No cause of action for reparation exists until payment of an unreasonable charge, and even at this stage of the litigation the charges which created the impounded fund and which, if unreasonable, would afford grounds for reparation have neither been finally collected from the farmers nor finally paid over to appellees.

If, however, a cause of action for reparation now exists or, upon the determination of this appeal adversely to appellants, would exist, it would not afford adequate relief to the farmers. Awards to them would be based on charges made during this litigation and up to November 1, 1937. Since the Secretary may not institute reparation proceedings on his own motion, it is clear that death, loss and

destruction of records, charges for attorneys' fees, and a ninety-day statute of limitation would combine to eliminate reparation as an effective remedy.

III

The Packers and Stockyards Act imposes a positive duty upon appellees which cannot adequately be enforced in reparation proceedings but can adequately and properly be enforced in this suit. Our contention in this respect is not foreclosed by the decision of this Court invalidating the Secretary's rate order. The very problem now presented to the Court was suggested by the petition for rehearing filed by appellants after the decision of April 25, 1938, in which appellants called this Court's attention to the fund impounded in the District Court and forecast the question which would arise as to its distribution. This Court in denying the petition for rehearing declared that the question as to the disposition of the impounded fund was not properly before it. Since that question was not before the Court it clearly was not decided, nor its present decision foreclosed.

IV

The proper basis upon which to distribute the impounded fund can best be determined by permitting the Secretary now to resume the proceeding in which the rate order in question was issued and, after according a full hearing to appellees, to

reconsider his original order. The corrected order will establish what were the reasonable rates to be charged during the period when the impounded fund was accumulated, and will thus provide a basis for the appropriate disposition of the fund.

There is ample authority in the Secretary of Agriculture to resume the proceedings and protect the rights both of the appellees and of their patrons, the farmers. The analogy to judicial procedure is compelling evidence that the vindication of procedural rights is consistent with substantive justice. The consequences of procedural error before an administrative body should be no different from the consequences of a corresponding error on the part of a court. The error which the Secretary committed did not render his order void in the sense that it could not be corrected by further proceedings, any more than a similar error would have foreclosed reconsideration of an erroneous decree by a court. *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 311. This Court has in a similar case fully protected rights both of procedure and substance by recognizing the right of an administrative agency to cure its procedural errors and by giving joint operative effect to the first and to the corrected order. *Atlantic Coast Line* v. *Florida, supra.* Other courts, armed with the power to remand, have reached precisely the result for which appellant contend on facts analogous to the case at bar. *New York Edison Co.* v. *Maltbie,* 244 App.

Div. 436, 279 N. Y. S. 949; *Brooklyn Union Gas Co.* v. *Maltbie,* 245 App. Div. 74, 281 N. Y. S. 233. Any objection that the New York cases involved direct review is met by decisions in which this Court on collateral review has protected substantive justice while providing for the correction of procedural irregularity. *Mahler* v. *Eby,* 264 U. S. 32; *Tod* v. *Waldman,* 266 U. S. 113. These several decisions taken together abundantly support the power of this Court so to condition its decree in this case as to avoid a result repugnant both to equity and to the aims of the Packers and Stockyards Act.

Appellees' objections to further proceedings by the Secretary are unsound. His reconsidered order will not be retroactive, but will on the other hand have no more retrospective effect than would a decree affirming his order after some years of litigation. A retroactive order is one which imposes liability without notice for conduct which has already occurred. If, for example, the legislature ratified the acts of executive officers which might otherwise have been attacked as invalid because of improper delegation of legislative authority, none can complain because his ground for attack upon the official action has been eliminated. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302. Defects thus may be cured after the event in order "that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430. Appellees'

fundamental error rests in viewing the further proceeding before the Secretary as a *new* rate proceeding. But this proceeding is merely ancillary to the original rate proceeding and to the invalidation by this Court of the Secretary's order for procedural error. Its only purpose and its only effect is to determine whether, and to what extent, the appellees have been prejudiced by the procedural defect in the earlier proceeding; this can appropriately be determined only by the Secretary. Finally, in *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, the Court gave a retroactive force to the second order, which cured the defect in the first order, although the pertinent statutory provision was identical to that now under consideration.

The appellees' argument that the funds must immediately be distributed to them because of the terms of the impounding order is unacceptable. There has been no "final disposition of this cause" until the Secretary has corrected the procedural error and reached a determination on the merits. Any other conclusion would contradict not only the further terms of the order indicating that the funds were collected "on behalf" of the farmers but the basic purposes of the Act.

The suggestion of appellees that there is no distinction between substantive and procedural error is contradicted by centuries of legal thought and by the decision of this Court in *Atlantic Coast Line* v. *Florida, supra,* 311, 312, 313, 315, 316. And, of

course, our analysis is equally applicable to errors of substance which do not go so far as to leave the order incapable of correction.

We cannot emphasize too strongly that sound government requires that courts and administrative agencies cooperate to secure both procedural and substantive rights. To confer substantive immunity because of procedural error would be to offer a rich reward for dilatory tactics and procedural entanglements on the part of parties not anxious to submit to regulation; the administrative agency hardly could hazard the substantive results of the proceeding upon its denial of any procedural claims, however far-fetched they may be. The unquestioned importance of procedural safeguards does not necessarily mean disruption of the administrative process; if the tribunal is given the same opportunity to correct its mistakes as is a lower court, both procedural and substantive justice can be preserved: The increasing importance of the administrative tribunal in the work of the federal judicial system means that it is a matter of importance to the courts, equally with the administrative agencies, that the specialized knowledge of the administrative tribunal and the background of judicial experience cooperate to produce good government. In the words of this Court in *Atlantic Coast Line* v. *Florida, supra,* 316, this situation "is a summons to a court of equity to mould its plastic remedies in adaptation of the instant need."

ARGUMENT

I

THE ACT CONFERS SUBSTANTIVE RIGHTS UPON THE FARMERS

It is unnecessary here to elaborate upon the broad purposes sought to be accomplished by the Packers and Stockyards Act. They have been described and approved by this Court (*Stafford* v. *Wallace,* 258 U. S. 495, 513–516; *Tagg Bros.* v. *United States,* 280 U. S. 420, 436–439), and are written plain on the face of the Act. So far as the stockyard regulation is concerned, the basic provisions are Sections 304, 305, and 307. Section 304 makes it the duty of every stockyard owner to furnish non-discriminatory and reasonable stockyard services. Section 305 provides:

> All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

Section 307 embodies the same requirements as to regulations and practices in respect to the furnishing of stockyard services.

These sections, of course, were not designed to be merely hortatory. They enacted a substantive rule of law which was to govern every transaction between the market agency and its patrons. But,

to ensure compliance with the statutory mandate, Congress also enacted two procedural remedies.

Sections 308 and 309 operate after the fact by conferring on a stockyard patron a cause of action to recover full damages for a violation of the Act. This cause of action may be asserted in reparation proceedings either before the Secretary or in any district court of the United States of competent jurisdiction. Cf. *Sullivan* v. *Union Stockyards Co.*, 26 F. (2d) 60 (C. C. A. 8th). Section 310, on the other hand, operates prospectively by giving the Secretary authority either on his own motion or on the motion of an interested person to prescribe reasonable rates and charges for the future. The language of that section is as follows:

> Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> (a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case * * *.

The Act thus provides merely a general statutory framework and wisely does not attempt to articulate the infinite details of procedure. Doubtless Congress had in mind that this Court has power to mold the statute to effectuate substantive justice. Cf. Landis, *Statutes and Sources of Law* (Harvard Legal Essays, 214). This generality of the enactment makes it all the plainer that these procedural sections of the Act were designed merely to afford a means of attaining the goal which Congress set in Section 305, namely, that "all rates * * * shall be just, reasonable, and nondiscriminatory."

Most of the difficulties of this case disappear when examined in the light of this basic, and apparently indisputable, relationship between the substantive and the procedural sections of the Act. The issue between appellants and appellees, for example, seems to reduce itself to the simple choice between construing the procedural sections as an end in themselves and construing them in a manner to guard the substantive rights of the farmers conferred by Section 305.

The fund impounded in the District Court—which that court has ordered distributed to appellees—represents the difference between the rates appellees charged during this litigation (up to November 1, 1937) and the rates fixed by the Secretary as reasonable. This Court has not yet passed on the merits of the Secretary's order, so the rea-

sonableness of the rates prescribed has not yet been finally determined. But, certainly, every available indication points to the validity of the Secretary's order. The proceedings before him explored the issues with great detail—the testimony covered 10,000 pages and the exhibits another 1,000 pages (304 U. S. at 16). The Secretary made elaborate findings (R. 26–94). The majority of the District Court on the first hearing said[3] (R. 164):

> If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases, only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence, but are in accordance with the weight of the evidence.

While Judge Reeves upon rehearing appears to have wavered somewhat as to the reasons for dis-

[3] It will be noted that the District Court, in exercising its independent judgment, gave a more thorough-going review than was required under the statute or Constitution. See the subsequent decision in *Acker* v. *United States*, 298 U. S. 426.

missing the bill (R. 241), the majority of the court on the second hearing, after the remand by this Court, stated (R. 246):

> We have reached the same conclusion on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

Thus, while the ownership of the impounded fund has never been fully determined, it is evident that the claim of the farmers cannot be dismissed as insubstantial. The Secretary, and on two occasions the District Court, have affirmatively declared the rates fixed in his order to be reasonable. No court or tribunal has held them to be unreasonable. If Section 305 is to be given any meaning, we do not see upon what basis—in the face of this consistent record of determinations that the funds collected from the farmers were in excess of a reasonable rate—the appellees can be given the impounded funds. The order of the court below, directing payment to the appellees, denies the substantive rights of the farmers not only without a determination that the rates charged by appellees were reasonable but in direct disregard of three determinations to the contrary. We cannot believe that orderly administration of the judicial process can produce such a result.

The importance of the procedural safeguards of Section 310 may not be minimized. Certainly we have no disposition in any manner to weaken their force or to suggest that the substantive rule of the

statute can ever justify a departure from procedural requirements. But we do insist that, irrespective of any action which the Secretary of Agriculture may have taken, the appellees remain under a duty to obey the mandate of Section 305. If, as was the case here, the Secretary erroneously failed to heed the procedural safeguards of Section 310, that error must be corrected. But, almost too plainly for argument, the procedural error does not confer upon appellees an immunity from the substantive provisions of Section 305. Appellees deny the Secretary's power to correct this error, and apparently contend that their duty to obey the command of Section 305 is conditioned by the validity of the procedural steps which the Secretary may have taken against them to compel the discharge of their duty. But the Packers and Stockyards Act, in Section 305, fixes the substantive rights of the farmers and requires that the procedural mechanisms evolved within the general framework of the Act be directed toward the cardinal requirement of the stockyard regulation: "all rates * * * shall be just, reasonable, and nondiscriminatory."

II

THE FARMERS' SUBSTANTIVE RIGHTS CAN ADEQUATELY BE PROTECTED ONLY IN THIS PROCEEDING

If it be admitted, as it must, that the Packers and Stockyards Act gives the farmers a substantive

right to be charged only reasonable rates,[4] the only remaining question is how these rights are to be preserved after the Secretary of Agriculture has made a procedural error. Appellees can adopt the bold position that the farmers are left without any means of translating their statutory right into a practical benefit. It seems unlikely that they would press their argument so far and improbable that this Court would accept a construction which so emasculated the Act. The only remaining alternatives which could permit affirmance of the District Court are either that the farmers have once had an adequate remedy during this litigation for the protection of their rights, which they have now lost, or else that they now have such a remedy. It is certainly true that only if one of these two propositions be established can appellees show any justification for the present release to them of the impounded fund. Otherwise the result would be that for more than four years, and under the order of a court of equity, charges of undetermined and extremely doubtful reasonableness have been collected which those compelled to pay them have been and are now helpless to challenge.

---

[4] Appellants—the United States and the Secretary of Agriculture—are, of course, empowered as "the public representatives" of the interest of the farmers in the impounded fund to urge that no distribution prejudicing the rights of the farmers should be made. *Cf. In the Matter of Lincoln Gas & Elec. Co.*, 256 U. S. 512, 517; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146.

1. The only means by which the farmers, appellees' patrons, might heretofore have protected their substantive rights against a possible invalidation of the Secretary's order because of procedural error would have been by bringing proceedings for reparation under section 308 of the Act. But there are insuperable objections which lie in the way of any contention that the farmers ought heretofore to have brought reparation proceedings before the Secretary. Section 308 has been construed to require that application to the Secretary precede institution of a suit. *Sullivan* v. *Union Stockyards Co.*, 26 F. (2d) 60 (C. C. A. 8th).[5] Clearly, the Secretary had no jurisdiction, during the pendency of this suit, to award reparations for rates being collected under order of court. For, if the Secretary were to have made an award, he would have been forced not only to impeach his own previous order then under review, by assuming that it would not be enforced or obeyed, but also to anticipate the decision of the court impeaching it.

An equally irrefragable objection to appellees' argument is that, during the pendency of this litigation, the essential basis for an award of reparation has not existed. The charges which, if unreasonable, would afford grounds for reparations, have

[5] If the *Sullivan* case is erroneous, so that application can be made directly to the District Court, equivalent considerations preclude reparation action by that court pending disposition of the proceeding in the three-judge court.

neither been finally collected from the farmers nor finally paid over to appellees. Accordingly, no cause of action has ever accrued to the farmers. Section 309 (a), *infra*, p. 84.

Traced to its source, the falsity of appellees' contention is found to lie in the assumption that appellees had original and continuing ownership of the payments which created the impounded fund; from this appellees argue that the farmers' causes of action for reparation accrued each day as payments were made. But clearly neither appellees nor the farmers had any original and continuing claim to that part of the collections in excess of the rate prescribed by the Secretary's order. The District Court, acting upon its right to do all things necessary to preserve and make effective its jurisdiction, held the money either for the market agencies or for the farmers; neither had title to it, each had an expectation of ultimately receiving it. The point is made clear by an examination of the language of the impounding order (*supra*, p. 4). Under its terms appellees were required to deposit in court all collections in excess of the rate prescribed by the Secretary and to file verified statements of the names and addresses "of all persons *upon whose behalf* such amounts were collected." These words do not bespeak ownership in appellees of the amounts collected and impounded—unless, indeed, it be the ownership of a trustee. The persons "upon whose behalf" the excess charges were

collected and impounded were the farmers who were being compelled by the restraining order to pay a rate found by the Secretary to be unreasonable. They were the persons to whom it was contemplated that the whole or a part of the impounded fund might become distributable. The language of the impounding order recognized their potential claim to the fund and forecast the time when distribution would be made according to the substantive rights of the parties under Section 305.

Under these circumstances it is manifestly unreasonable to assert that the farmers ought to have gone through needless and burdensome reparation proceedings for the purpose of raising and having determined the very issue which was already before the District Court. That reparation proceedings would have been burdensome to all parties concerned requires no demonstration. That they would have been needless ought to be clear enough, for at least until the validity of the Secretary's order was finally settled it could not have been known that the farmers were not already the lawful owners of the impounded fund which represented the charges in excess of his order.

2. The only question remaining, therefore, is whether the farmers may *now* maintain proceedings effectively determining their substantive rights to pay only reasonable rates and to receive back any amounts paid, under the court order, which may have been in excess of such rates.

Certainly up to the moment of this Court's decision invalidating the Secretary's order the farmers could not properly have brought reparation proceedings.[6] It does not follow, however, that their causes of action under the statute arose when the order was set aside, for although this Court held the order invalid it also ruled in its opinion on the petition for rehearing that its decision did not settle the question as to the ownership of the impounded fund. It cannot be known, therefore, until the determination of the issue presented on this appeal that the farmers have no recourse but to reparation proceedings. In the present status of this case it is not clear that the funds in question do not lawfully belong to the farmers and thus they cannot yet show a cause of action for reparation.

Should this Court uphold the action of the District Court in ordering distribution of the impounded fund to appellees, the farmers would be remitted to their remedy by reparation (or possibly restitution) if they are to be protected at all in this case. The inequity of forcing such a course upon them is manifest. The years which have passed since their payments were made have unquestion-

[6] In the text we shall discuss only reparation proceedings. It may be that the farmers could bring a bill for restitution (cf. *Atlantic Coast Line* v. *Florida*, 295 U. S. 301), but this action would be subject to the same practical disadvantages as would be the reparation proceeding.

ably brought with them changed conditions which would make relief by reparation illusory. Many of the parties, both farmers and market agencies, would have died or gone out of business. Records would have been lost or destroyed. Especially in view of the ninety-day period of limitation, it is doubtful that more than a small fraction of the farmers would take the affirmative action of instituting proceedings. Attorneys' fees and the necessary multiplicity of action would discourage those who considered suit. These practical difficulties, even if appellees were to concede that reparation proceedings may still be brought, would very effectively remove all possibility that adequate justice could in this manner be done to the farmers.[7]

[7] It might be thought that some of the difficulties arising out of dissipation of the impounded fund could be obviated by an order directing that the fund be held for a reasonable time for disposition in accordance with orders duly made by the Secretary in reparation proceedings under Section 309. If the only means of determining on the merits the reasonableness of the rates which produced the impounded fund were a reparation proceeding, clearly a court of equity could not do less than make such an order, for the farmers obviously have an equitable right to the preservation of the fund, created out of payments made by them under order of court, until the validity of the charges they were compelled to pay can be determined. But because of the difficulties to effective reparation, such a disposition of the case, as a practical matter, would afford the farmers little, if any, relief.

III

THE RIGHTS OF THE FARMERS HAVE NOT BEEN FORECLOSED BY THE PRIOR DECISIONS OF THIS COURT

Appellees, not unnaturally, have devoted little argument to establish any other remedy of the farmers. They insist, instead, that the problem begins and ends with the decision of this Court on April 25, 1938, holding the Secretary's order invalid. 304 U. S. 1. This decision, they insist, compelled the District Court forthwith to pay over to them the impounded funds, and meant that any other course would have been in disobedience to the mandate of this Court.

The opinion of the Court on May 31, 1938, denying the petition for rehearing (304 U. S. 23), makes it clear that this question was not thereby concluded. It will be recalled that appellees argued to this Court, in opposing the petition for rehearing, that this cause had been terminated by the reversal of the District Court's decree and the invalidation of the Secretary's rate order, with the result that distribution to them of the moneys impounded in the District Court followed automatically.[8] Appellants, on the other hand, argued that the procedural error of the Secretary in not according appellees a full hearing, and the invalidation of his rate order because of that error, did not determine the substantive statutory right of appellees'

[8] Memorandum in Opposition to Petition for Rehearing, pp. 12–13.

patrons to be charged only reasonable rates, or foreclose determination of that right.* With this issue before it, this Court said (304 U. S. at 26):

> * * * The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

Since the Court declared that the question as to the disposition of the impounded fund was not before it, no sensible argument can be made that the decision of the Court determined that question. Moreover, since this Court did not undertake to determine the question as to the ownership

---

*Petition for Rehearing, pp. 9–15; Memorandum in Reply to Memorandum in Opposition to Petition for Rehearing, pp. 4–12.

of the fund, its mandate could not possibly have compelled the District Court to order automatic distribution of the fund to appellees.

The appellants, of course, are not arguing that this Court has already held that appellees have no claim to the impounded fund, but simply that invalidation of the Secretary's rate order did not establish that claim. The briefs filed in support of and in opposition to the petition for rehearing raised the question of the ownership and distribution of the impounded fund. This Court held only that these questions, "both of substance and of procedure," did not depend upon the terms of the impounding order, or upon any other matters then in the record, but upon matters not in the record which the Court should not "attempt to forecast or hypothetically to decide." Chief among these matters was the question of "what further proceedings the Secretary may see fit to take in the light of our decision."

IV

THERE IS AMPLE AUTHORITY IN THE SECRETARY OF AGRICULTURE TO RESUME THE PROCEEDINGS AND PROTECT THE RIGHTS BOTH OF THE APPELLEES AND OF THE FARMERS

It has been shown that the Packers and Stockyards Act gives to the farmers a substantive right to receive stockyard services at no more than reasonable rates, and that the Secretary's order fixing such rates has twice been sustained on the merits

by the District Court. It has been shown that these substantive rights of the farmers cannot adequately be preserved by reparation proceedings. These rights plainly can be protected by an order staying the distribution of the impounded funds until the Secretary, after according to appellees the full hearing prescribed by this Court, has reconsidered his original order and has provided a basis for the appropriate distribution of the impounded funds. The only remaining question is whether there is anything in the Act or in the decisions of this Court which forbids this course of action. It will be seen, we submit, not only that there is nothing to forbid so sensible a procedure but also that the decisions of this Court and of other courts affirmatively support the appellants.

A. THE ANALOGY TO JUDICIAL PROCEDURE IS COMPELLING EVIDENCE THAT VINDICATION OF PROCEDURAL RIGHT IS CONSISTENT WITH SUBSTANTIVE JUSTICE

This appeal deals with a case of complex but not conflicting social values; a case in which it is the duty of the courts to recognize and safeguard the essential guaranties of one group without destroying the rights of another. A solution of the problems of this case comes readily once it is recognized that appellees' right to a full hearing is not something alien to and apart from their patrons' right to be charged only reasonable rates.

Appellees' argument strikes an anachronistic note. The reasons for the ruthless procedural per-

fection of the ancient common law were pointedly illustrated by Chief Justice Eyre in *Morgan* v. *Sargent*, 1 Bos. & Pul. 58, 59–60:

> You must argue it as a mere point of form; if you attempt to argue on the substance, you must fail. This is a slip in form; but it is always the best way to make the party pay for this kind of slip, if advantage is taken of it by special demurrer. * * * The party * * * must pay for his blunder.

But this is a tradition which has long since been discarded in our jurisprudence. It is unnecessary to discuss the revolution in legal procedure which has occurred since Chief Justice Eyre admonished counsel in 1797. It is sufficient that civil procedure is no longer notable chiefly as a vehicle for display of the *elegantia* of the lawyer's craft but fulfills its function only so far as it permits a ready decision on the merits. See, e. g., Rule 61 of Federal Rules of Civil Procedure.

Appellees urge, in effect, that administrative tribunals be held to far stricter standards than inferior courts, so far as concerns the consequences which follow upon procedural errors. We find this position difficult to comprehend. The administrative tribunal, of necessity, proceeds upon a much more informal basis than do courts. Its procedure is not and cannot be crystallized, in view of the volume of work and type of questions with which it must deal. The statutes governing the

procedure of administrative tribunals, accordingly, are uniformly cast in the most general terms. In addition, these administrative agencies are a development so recent that neither experience nor the decisions of this Court have yet produced any very definite guiding principles of procedure. Certainly, when its procedure is designedly less formal, the consequences of procedural error before an administrative body should be no different from the consequences of a corresponding error on the part of a court. Appellees, however, cannot rest upon a demand so modest as to have the consequences of error in judicial proceedings applied to administrative proceedings. They must, to carry their argument, induce this Court to follow them to the paradoxical point that procedural errors, in the much less formal administrative proceeding, have consequences far more drastic than those in the highly crystallized proceedings in inferior courts.

Administrative irregularity is not essentially different from judicial irregularity. There is no need to expand upon the procedure of courts in correcting judicial error. This Court has frequently reversed a decree because procedural error was committed by an inferior court and later has considered the lower court's decision on the merits after the procedural error had been cured. E. g., *Allen* v. *United States*, 150 U. S. 551; 157 U. S. 675; 164 U. S. 492; *Sullivan* v. *Iron Silver Mining Co.*,

109 U. S. 550; 143 U. S. 431; *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349; 250 U. S. 256; 168 U. S. 451; *Union Pacific Railway Co.* v. *United States*, 104 U. S. 662; 117 U. S. 355. Neither the Court nor the litigants would have entertained the suggestion that the commission of procedural error by the inferior court had terminated the case or that it had foreclosed the substantive rights which the cause had been instituted to adjudicate. Appellants contend for no more than that courts and litigants adopt the same view in cases involving orders of administrative tribunals. The struggle of common law courts against hypertechnicality has been inspired by the realization that ultimate justice should be the end of all litigation. Appellants contend it should be so in administrative no less than in judicial proceedings.

The problem, then, is how to protect appellees' right to a full hearing while at the same time safeguarding the farmers' right to be charged only reasonable rates. Should the impounded fund be distributed to appellees without a final determination ever having been made of the reasonableness of the rates appellees charged, the farmers' right to be charged only reasonable rates will not have been adequately protected, if, in fact, such rates were unreasonably high. The common-sense solution is to permit the Secretary now to cure the procedural defect in his first determination, and then to enter a reconsidered order fixing the rates, such that the District Court may know how the impounded fund should be distributed.

Appellees contend that correction of the "wholly invalid" rate order is impossible. It seems clear enough that they can not be sustained in this respect. This Court, in its opinion of April 25, 1938, did not hold that the Secretary's rate order of June 14, 1933, was void. What the Court said was that, since the hearing was fatally defective, the order of the Secretary was invalid. Appellants have no disposition to quibble over terminology; the point is simply that the Secretary's order did have legal consequence until set aside. It was invalid in the sense that its validity could successfully be contested by appellees by direct attack in the courts. The order clearly was not a complete nullity. *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 311. The proceeding, of course, was not a sham or pretense (cf. *Moore* v. *Dempsey,* 261 U. S. 86). If appellees had not moved to enjoin its enforcement, they clearly could not have ignored its existence and have refused to comply with its terms. "Obedience was owing while the order was in force." *Atlantic Coast Line* v. *Florida, supra.* This is true because the Secretary had jurisdiction over the parties and over the subject-matter; if he proceeded improperly or contrary to law, he was guilty of error subject to correction on review. The distinction between error and want of jurisdiction is thoroughly established in our judicial procedure. The *Atlantic Coast Line* case demonstrates that the distinction is no less applicable to administrative agencies and proceedings.

The point which appellants make may be illustrated by the example this Court used in its opinion of April 25th. Its appositeness is the more striking since appellees here urged the identical analogy to this Court in their brief (p. 80) and in oral argument on the prior appeal. If in an equity cause the special master or chancellor permitted plaintiff's attorney to formulate findings upon the evidence and conferred *ex parte* with plaintiff's attorney regarding them, and then adopted the findings without affording defendant's attorney an opportunity to know their content and to present objections, there would be no hesitation by the appellate court in setting aside the report or decree as having been made without a fair hearing. But the decree would be subject only to direct attack; it could not be impeached collaterally. Unless and until the party aggrieved by it appealed and secured its reversal, the decree would stand as an adjudication of the rights of those concerned. Appellees would not argue that such a decree had no legal consequence.

We may take the example a step further. Appellees would not contend in the supposititious equity suit that a reversal of the trial court's procedurally erroneous decree adjudicated the substantive rights of the parties. Indeed, the suggestion that because defendant had been denied a fair hearing he should, upon reversal of the procedurally erroneous decree, be awarded a judgment on the merits would summarily be rejected. Where a serious procedural defect arises in the course of a

hearing before a master, the appellate court must reverse the decree confirming his report; but the cause may be remanded for resubmission to the master and the substantive rights of the parties remain unaffected until a valid judgment has been reached on the merits.

But appellees' thesis will not permit them to concede such a just result in administrative proceedings. In order for them to prevail they must argue that the Secretary's error in denying them a full hearing had the inescapable effect of defeating the Congressional mandate that they charge their patrons no more than reasonable rates. Appellees are contending that although in the supposititious equity suit the procedurally erroneous decree has legal consequence, an administrative agency's procedurally erroneous order has none; that although the procedurally erroneous judicial decree leaves substantive rights unaffected, the procedurally erroneous administrative order forecloses them. The District Court has subscribed to this view. The proposition, if it were accepted by this Court, would effectively destroy a substantial part of the value and efficiency of administrative agencies.

B. THIS COURT IN A SIMILAR SITUATION HAS PRESERVED SUBSTANTIVE JUSTICE BY GIVING EFFECT TO THE ADMINISTRATIVE AGENCY'S CORRECTION OF PROCEDURAL ERROR

Since the error of the Secretary did not deprive him of jurisdiction over the parties or the subject-matter, the proceedings were not a nullity and may be continued with the purpose of curing the pro-

cedural error which made the original order invalid. More particularly appellants insist that the Secretary has the power, inherent in any judicial or administrative tribunal, to resume the proceeding wherein he committed error, and after according appellees the rights to which they are entitled, enter a reconsidered order. From this it follows that the District Court should have recognized that power and preserved the *status quo* during its exercise. Appellants are not without authority for this principle of administrative law for which they contend. Cases in law and equity, which present illuminating analogies, are, of course, numberless. In addition, there are cases involving administrative proceedings which, though not numerous, persuasively support appellants' position on this appeal.

Atlantic Coast Line v. *Florida*, 295 U. S. 301, is such a case. There a rate which the Railroad Commission of Florida had fixed for the transportation of logs in intrastate commerce was so low as to be unjustly discriminatory against interstate commerce. The Interstate Commerce Commission undertook to prescribe a higher rate which would supersede the State rate and remove the existing discrimination. The order which the Commission first entered was upheld by the three-judge district court but was set aside by this Court because the Commission had failed adequately to find and state the facts upon which the validity of its order depended, namely, the facts showing that the intra-

state rate caused unjust discrimination against interstate commerce (282 U. S. 194). The Commission took the case back, reopened it, heard new evidence, made new findings, and prescribed the same rate which it had put into effect before. This second order was upheld by this Court (292 U. S. 1).

The third appeal (295 U. S. 301) presented a different question. The first order of the Commission had been upheld by the three-judge court, and the carrier had collected the higher rate from the date of the three-judge court's decree dismissing the shippers' bill until the mandate of this Court reversing that decree was filed in the lower court. When the mandate of this Court went down, the shippers, who had been compelled by the erroneous order of the lower court to pay the higher rate, petitioned for an order of restitution against the railroad. The lower court ordered a reference to determine what disposition in equity and good conscience should be made of the case. Its conclusion was that equity required only partial restitution. This Court held that the shippers were entitled to no restitution at all. The reasoning of the Court was that restitution was not a matter of right operating automatically, but rested in discretion, to be ordered or refused according to the equitable principles applicable in actions for money had and received; that the evil which the Commission's first order was designed to correct was one which positive statutory command prohibited and made un-

lawful; that the attempted correction of the evil in the first instance had failed only through a defect in the form of the Commission's order, through a procedural slip; that the subsequent order, wherein the defect had been cured, showed a continuation of the evil; and that the rates collected under the first invalid order were shown by the second and valid order to have been fair and reasonable, so that in equity and good conscience the shippers could not say they were entitled to the restoration of what was a proper charge in the first instance.

The opinion of the majority has significance here in several respects. The Court obviously regarded the defect in the Commission's first order as being curable and regarded the Commission as having the power to cure it. It spoke of the Commission as having "cured the defect in form of its earlier decision" (295 U. S. at 311). It said that the Commission in its first attempt to discharge its duty under the applicable statute "was foiled through imperfections of form, through slips of procedure" (p. 312). More significant, perhaps, is the fact that this Court recognized that the invalid first order, though it was never, as such, validated, retained some vestige of legal consequence even after being set aside. Indeed, to such an extent did its force continue that this Court considered it together with the second order in determining what the proper rate should have been during the period when no valid order of the Interstate Commerce Commission was in existence. The Court recog-

nized that the need to eliminate discrimination against interstate commerce was not removed by a procedural error and that the Commission's imperfect order, directed against the evil but missing the mark because of procedural error, had to be regarded as relevant in the inquiry whether the railroad had received money which it was in equity bound to return. The Court said (p. 312):

> Unjust discrimination against interstate commerce, "forbidden" by the statute, and there "declared to be unlawful," * * * does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning.

The *Atlantic Coast Line* case also was not without its procedural difficulties, as the majority and dissenting opinions both recognized. There was the obvious difficulty that the rates which the Coast Line had collected were not supported by any lawful order and that the shippers would not have been compelled to pay those higher rates but for the trial court's error in holding the Commission's order valid. A greater difficulty, and one insuperable to the minority, was that denying restitution, under the circumstances of that case, was tantamount to sanctioning the carrier's

violation of a lawful rate order of the Railroad Commission of Florida—for if there was no valid order of the Interstate Commerce Commission in existence the State rate was applicable. The majority of the Court was not prevented by these obstacles from reaching what it regarded as an equitable solution of the perplexing problem; it came to the conclusion "that restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements" (p. 312).

Appellees have argued that the *Atlantic Coast Line* case is inapplicable here. Of course, that case and this one are not fact-for-fact the same. But they have sufficient points of contact to indicate with some clarity the proper approach to a problem not yet thoroughly worked out by the courts. We have here the Secretary of Agriculture, as an administrative agency, charged with the duty of correcting the evil of unreasonable and discriminatory rates, and attempting, though imperfectly, to correct it. The failure of his first attempt resulted from his denial of a full hearing to appellees, and this Court has completely protected and vindicated their rights, just as it protected the rights of the shippers in the *Atlantic Coast Line* case, by declaring the rate order invalid and unenforceable. This Court in the *Atlantic Coast Line* case protected the shippers' rights just as far as they were entitled to have them protected, and no farther. They were entitled to all procedural safeguards

and the Court effectively required that the Commission accord them their rights. But the shippers sought to extend their claims beyond any point necessary to give them full protection, to a point, indeed, where the completely vindicated procedural rights would have been made the instrument for defeating substantive rights. This Court would not make its processes available for the attainment of such a result. It found the parties in a situation where equity had been done, where the rights of the parties had been protected just as far as justice required, and the Court left the parties where it found them.

In the *Atlantic Coast Line* case the minority felt that the decision of the Court invaded the right of a sovereign state to regulate intrastate rates so long as no valid rate of the Interstate Commerce Commission covered the field. Of course, no problem of conflicting sovereignties is presented here, so, putting that aspect of the *Atlantic Coast Line* case aside, the chief point of difference between that case and the one at bar is that there the carrier had already received the rates fixed by the invalid order while here the farmers have not yet actually had the benefits of the reduced rates, but the differential has instead been paid into court. But if the court of equity will stay its hand in order to protect the carrier against a technically persuasive claim for reparation, in obedience to the statutory

prohibition of discrimination against interstat commerce, so too will it mold its decree to protec the farmer against dissipation of the impounde funds until the merits of this proceeding have bee decided. The accidents of procedure differ as be tween the two cases, but the basic question as to th flexibility of the powers of a court of equity and th occasion for their exercise in obedience to the stat utory mandate are identical.

Here, as in the *Atlantic Coast Line* case, the vin dication of appellees' rights need go only so far as is necessary to assure them the full hearing to which they are unquestionably entitled and may not properly go beyond that point and grant them im munity from the substantive provisions of the Act to the prejudice of the rights of their patrons, the farmers. Just as the procedural rights of the ship pers and the substantive objectives of the statute were protected by the Commission in curing the defect in its first decision, so appellants assert that appellees' procedural rights and the farmers' sub stantive rights may in this case be protected by per mitting the Secretary to cure the procedural defect in his first order. Just as the original order of the Commission, when coupled with its second order, provided in the *Atlantic Coast Line* case the basis for determining the money liability between the railroad and the shippers, so the reconsidered order of the Secretary in this case will provide the basis for determining how the impounded fund should be

distributed. The spirit of the *Atlantic Coast Line* case, as well as the positive command of the Packers and Stockyards Act, will be set at naught if appellees succeed in defeating their substantive obligations under the Act. And, because of the practical inadequacy of remedy by way of reparation, appellees will effectively defeat their substantive obligations under the Act if they are permitted now to receive the impounded fund without there having been any definitive administrative or judicial determination of the reasonableness of the rates which produced it.

C. OTHER COURTS, ARMED WITH THE POWER TO REMAND, HAVE REACHED THE PRECISE RESULT FOR WHICH APPELLANTS CONTEND ON FACTS ANALOGOUS TO THE CASE AT BAR

The *Atlantic Coast Line* case demonstrates that this Court, on facts more difficult than in the instant case, has molded its processes in order to ensure administrative justice, even though the initial challenge to the order was made in a proceeding which in form was collateral, such that this Court could not remand directly to the administrative tribunal for correction. Compare *Pacific Gas & Electric Co.* v. *Railroad Commission,* 16 F. Supp. 884 (N. D., Cal.). It is not surprising, therefore, to find that other courts, armed with the express power to remand the case directly to the administrative agency, have reached a similarly just result. *New York Edison Co.* v. *Maltbie,* 244 App. Div. 436 (3d Dept.), 279 N. Y. S. 949; *Brooklyn*

Union Gas Co. v. *Maltbie*, 245 App. Div. 74 (3d Dept.), 281 N. Y. S. 233. These cases involve substantially similar facts, and it will be sufficient to examine *New York Edison Co.* v. *Maltbie*. There the New York Public Service Commission fixed temporary emergency rates for electrical energy to be sold in New York City for a one year period. No general rate proceeding was instituted or pending at the time—the Commission simply undertook to lower the existing rates for a period of one year. The electric companies affected by the orders secured in a trial court a restraining order against enforcement of the orders (150 Misc. 200, 270 N. Y. S. 409), but that court required them to impound the difference between the old rate and the new temporary rate. This restraining order remained in force during the year and over eight million dollars were impounded. The electric companies obtained certiorari in the Third Department of the Appellate Division to review the Commission's orders. That court held the temporary emergency rate orders invalid, not only because there was lacking any authority in the Commission to make a temporary rate order except in conjunction with a general rate inquiry but also because the Commission had made several serious errors in arriving at the rate bases which it used. By the time the Appellate Division rendered its opinion invalidating the orders the year during which they were to be effective had passed and all impounding

under the restraining order had ceased. The court said, as to the disposition of the impounded fund (279 N. Y. S. at p. 960):

> By the terms of the orders under review in this matter, the period during which the rates were to apply has past. The final determination as to the legality of the rates set up will have no effect upon either the current prices paid by customers or those which have been paid since September 1, 1934. It will, however, determine the ownership of more than $8,000,000 impounded under the restraining order. If the rates fixed for the year beginning September 1, 1933, are finally determined to be confiscatory, the money will belong to the companies; if sustained, it will belong to the consumers. As in the *Lindheimer* case [*Lindheimer* v. *Ill. Bell Tel. Co.*, 292 U. S. 151], time has now elapsed so realities may replace conjectures and estimates, or at least may be used to check conjectures and estimates.[10]

This thoroughly just result makes doubly significant the close factual resemblances in the problems presented in that case and on the present appeal. In the first place, the statute[11] authorizing

---

[10] It may be noted that the Secretary's order of August 26, 1938, appointed an Examiner, *inter alia*, to take evidence concerning changed conditions. See Appendix B, *infra*, p. 100.

[11] Laws of 1910, Ch. 480, as amended by L. 1934, Ch. 212, April 13; Cahill's Consolidated Laws of New York, Ch. 49, Section 72.

the New York Commission to initiate proceedings relating to an order fixing the price of gas or electricity provides:

> * * * *After* a hearing and *after* such an investigation as shall have been made by the commission or its officers, agents, examiners, or inspectors, the commission may, by order, fix just and reasonable prices, rates, and charges * * *. [Italics added.]

Here, as in section 310 of the Packers and Stockyards Act, the details of the procedural section could have been magnified into an instrument for defeating substantive justice. The court, however, wisely concentrated on its equitable duties with respect to the impounded fund. In the second place, the restraining order was conditioned in the following manner—"if the Appellate Division upon final determination of the certiorari proceeding affirms the determinations and orders of the Commission, petitioners shall repay to their consumers * * * the difference between the rates and charges required by said orders and the rates required by the present schedules * * *" (270 N. Y. S. at 417). Or, as the Appellate Division characterized it, the impounded money was to be refunded to the consumers "in the event the orders of the commission should be sustained." It will be recalled that in the present case impounding was ordered "pending final disposition of this cause." Clearly in the *New York Edison Co.* case the electric companies were in a position to contend, in view of the language of

the restraining order, that the impounded fund belonged to them by force alone of the decree of the Appellate Division, just as appellees here argue. But the Appellate Division recognized that the setting aside of the temporary rate orders had no effect at all on the substantive question which the case presented, namely, whether or not the rate which had produced the impounded fund was a reasonable rate. It therefore recognized the unvarying duty of a court of equity to mold and condition its decrees to accomplish justice.

Similarly, in the *Brooklyn Union Gas Co.* case a large sum of money was impounded under a restraining order which suspended the operation of temporary emergency rates, and when the Third Department of the Appellate Division set the rate orders aside the Gas Company claimed the right to immediate restitution of the impounded fund. But in answer to this claim the court said (281 N. Y. S. at 235):

> The court chooses to direct a new hearing herein on the merits on the theory that the commission began this rate proceeding under statutory authority; that its *ultra vires* acts in assuming to legislate that an emergency existed, and the other prejudicial errors of law, were mistakes of procedure. The ownership of a large sum of money earmarked under the provisions of the March 14, 1934, order must be determined.

In this instance the court recognized that difficulties might be encountered in attempting to fix rates

for a definite period of one year apart from a proceeding incidental to the fixing of permanent rates, and said that if those difficulties were insurmountable the commission or the courts might dismiss the proceeding later. But the court was not willing to permit its invalidation of the orders for procedural errors to have the automatic effect of giving the Gas Company the impounded fund.

D. THIS COURT HAS PROTECTED SUBSTANTIVE JUSTICE IN CORRECTING PROCEDURAL IRREGULARITIES ON COLLATERAL REVIEW.

The New York cases, discussed in the preceding section, typify the manner in which equitable principles and administrative justice can unite to preserve both procedural and substantive rights. We recognize, however, that they arose on direct review of the administrative tribunal. The mechanics by which the cause is returned to the administrative agency to correct its error are simpler when the mandate runs to the agency itself than when the judicial review takes the collateral form of a suit for an injunction. But this distinction is more superficial than real. By molding its decree to fit the needs of the case, the equity court has the same power to do justice when review is by suit for an injunction as when process runs directly to the administrative agency.

It is, however, unnecessary to speculate as to the capacity of courts on collateral review to reach such a situation. For in two immigration cases

this Court on collateral review of administrative action has entered orders which in every basic feature seem precisely analogous to that appellants seek here.

Mahler v. *Eby*, 264 U. S. 32, was a *habeas corpus* case involving certain aliens who were being held for deportation. They had been convicted of crime and the Secretary of Labor, after a hearing, had ordered them deported. The statute under which the Secretary acted authorized him to order deportation of persons found by him to be "undesirable residents of the United States." The warrants of deportation which the Secretary issued did not contain such a finding—in other words, as in the *Atlantic Coast Line* case, the orders did not show the finding of fact necessary to support the statutory authority to act. For that reason, this Court held the warrants of deportation void. Upon reaching that point the Court had fully protected the alien's procedural rights; the Court had said the warrants were invalid and that relators could not be deported under them. But there were other rights involved, the rights of the government and of the citizens. Accordingly, this Court said the law did not require that relators be released because a procedural error had been committed. The Court held that relators should be detained for a reasonable time until the Secretary of Labor could "correct and perfect his findings" (264 U. S. at p. 46). It is true the Court referred to Section 761

of the Revised Statutes as supporting its conclusion; but that section gives nothing beyond this Court's equity powers, for it merely authorizes the Court in a *habeas corpus* case "to dispose of the party as the law and justice require." The Secretary of Labor in the *Mahler* case was thus permitted to cure the defect in his deportation order by reopening the proceeding and making the findings which he had failed before to make. The Court recognized that to be deported only under a valid warrant was relators' statutory right but that to be freed because the Secretary of Labor had made a procedural error was more than they could demand.

In *Tod* v. *Waldman,* 266 U. S. 113, a situation more closely comparable to that at bar was presented. Mrs. Waldman and her three minor children, all immigrants, were ordered deported on the ground, among others, that she was illiterate and likely to become a public charge. They sued out a writ of *habeas corpus.* The District Court dismissed the writ, but the Circuit Court of Appeals reversed on the ground that Mrs. Waldman had been denied a fair hearing before the immigration authorities, particularly in that she had been deprived of the statutory right of appeal to the Secretary of Labor. The Court of Appeals directed the District Court to grant the writ and to discharge the relators from custody. 289 Fed.

761 (C. C. A. 2d). On petition for rehearing the Court of Appeals said (p. 767):

> If, as here, we find the proceeding was not in accordance with the law, the result is that the relator is discharged from custody.

This Court reversed. It held that by being deprived of the right to appeal to the Secretary of Labor, Mrs. Waldman and her children had been denied the full and fair hearing guaranteed by the statute, but that (266 U. S. at 118):

> This denial of appeal did not give them a right of admission to the country.

Government counsel in that case, apparently unaware of *Mahler* v. *Eby*, urged only that the cause should be remanded to the District Court for a fair hearing on the question of admission to the country. The Court, however, ordered relators held for thirty days after the issuance of the mandate "to await the hearing on the appeal before the Secretary of Labor" and provided for their discharge if the Secretary did not act within the time limited. This action was taken because the Court decided that the issues could better be determined before the Secretary of Labor.[12] It said (p. 119):

---

[12] So, in the case at bar, the best way to assure protection of all the rights involved is to maintain the *status quo* as to the impounded fund until the Secretary has awarded appellees the rights to which they are entitled and then to dispose of the fund on the basis of the reconsidered order. Unquestionably an administrative determination of reasonable rates and charges is preferable because it is simpler, be-

Without saying that the circumstances might not arise which would justify such a variation in the order from that which we now direct, we do not think that the course

---

cause it calls for the exercise of expert knowledge in limited fields, and because Congress so intended it. The excerpt quoted above adequately expresses this Court's view in this respect.

But if this Court holds that administrative determination is impossible now because the Packers and Stockyards Act prohibits the Secretary from resuming this proceeding, the problem presented by this appeal is still unanswered. We have shown that nothing which appeared in the record up to the time this Court last spoke in this case had any determinative effect on the disposition of the impounded fund. We have shown that the reversal of the District Court's decree and the invalidation of the Secretary's order had no such effect. And obviously nothing has since been done in or by the District Court which has any bearing on the questions involved in the proper distribution of the impounded fund. The District Court has in its custody a fund collected by one group upon behalf of another and nothing which it has done or decided in the case has been directed toward ascertaining title thereto. Should the Court decide that administrative determination of the questions here presented is unavailable, it would then be necessary to provide for judicial determination of the ownership of the fund according to equitable principles, as in an equity proceeding conducted after entry of judgment (*B. & O. R. Co.* v. *United States*, 279 U. S. 781, 785). This course might involve, procedurally, referring the cause to a master or hearing the case in open court or on depositions; the method is immaterial. It would involve in principle, a consideration of the complex problems affecting rate structures and a final decision as to what rates appellees should have charged their patrons during this litigation and up to November 1, 1937. When the court decides what were reasonable rates during that period it would know upon what basis the impounded fund should be distributed.

taken in the cases cited should guide us here. In those cases the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualifications of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of the appeal, by the Secretary and his assistants, who have constant practice and are better advised in deciding such questions.

The *Waldman* case has particularly pertinent application here. The procedural defects in that case and this are the same—defects arising from the denial of a full hearing at some stage in the proceedings. The Court of Appeals in that case took a very narrow view of its duties and powers and felt compelled to discharge the relators once it found denial of a full hearing. Such a holding obviously proceeded from a misconception of the relation between the rights involved. To argue that because Mrs. Waldman had been denied a fair hearing she therefore was entitled to be admitted

to the country was to argue that because procedural rights had been denied therefore substantive rights were determined. To have sustained the Court of Appeals, apart from the fact that its order discharging relators would not prejudice further deportation proceedings, would have meant holding that Mrs. Waldman acquired a substantive right by being denied a procedural right. Similarly to sustain the District Court in this case would mean either that the denial of appellees' procedural right established the reasonableness of the rates they were charging or that, because they were denied a procedural right, they are licensed to charge those rates whether reasonable or not.

Review by *habeas corpus* is substantially indistinguishable from review by injunction in cases involving administrative action; if anything, the equitable process has a greater flexibility. If this were a case of a direct petition for review, as is the case with many of the federal administrative tribunals, there would be no doubt of the Court's power to remand the proceeding to the Secretary of Agriculture for correction of procedural errors and of the order involved. The fact that in the deportation cases review was indirect, by way of *habeas corpus*, rather than direct did not prevent this Court from reaching the result appellants contend for here. In those cases the Secretary of Labor was recognized as having the power to reopen the proceedings, correct his errors, and to reconsider his defective orders; so that this power

might be effectively exercised the Court ordered the *status quo* to be maintained pending his action. The Court there had no power to remand; it accomplished the result simply by conditioning the decree which it entered.

A court of equity in setting aside the procedurally defective order of the Secretary of Agriculture is under a correspondingly clear obligation so to condition its decree that no inequity be done. Such a disposition would seem to follow *a fortiori* on the authority of *Mahler* v. *Eby* and *Tod* v. *Waldman*. Deportation, as this Court said in *Ng Fung Ho* v. *White*, 259 U. S. 276, "may result in loss of both property and life; or of all that makes life worth living." Relators in the *Waldman* case, for example, had fled religious persecution in Russia and feared that if deported they would be in danger of death (289 Fed. at p. 762). Yet, even when this compelling interest was measured against the rather intangible interest of citizens generally in having the immigration laws enforced, the Court directed that the *status quo* be maintained until there could be a proper disposition of the case on the merits. The relators were thereby kept in custody, notwithstanding the judgment in habeas corpus would not have been *res judicata* if they had been released and the immigration authorities had commenced proceedings anew. The continued custody served merely to eliminate the possibility that the relators could not again be apprehended.

The deportation cases thus serve pointedly to illustrate that there is ample basis in authority for the protection of the farmers' substantive rights under the Packers and Stockyards Act. We have shown both that these rights cannot adequately be protected save in this proceeding and that nothing previously done in this case has foreclosed their protection. Furthermore, persuasive authorities furnish the guideposts leading to the result in law which the facts and equities of this case compel. *Atlantic Coast Line* v. *Florida*, though different from this case in its procedural aspects, teaches the fundamental principle of justice and equity upon which our arguments are based—that a court may so mold its action that rights of procedure will be protected without conferring immunity from substantive obligations. The New York cases demonstrate that a court having the power to remand will exercise that power to reach a result harmonious with justice. In *Mahler* v. *Eby* and *Tod* v. *Waldman* this Court made clear the self-evident truth that the vindication of procedural safeguards need not foreclose the determination of substantive obligations. By the simple expedient of conditioning its decree this Court may here, as it did in the deportation cases, strike a proper balance between the coordinate rights of procedure and substance to attain the only result consistent with judicial and administrative justice.

I. APPELLEES' OBJECTIONS TO FURTHER PROCEEDINGS BY THE SECRETARY ARE UNSOUND

With much that we have said appellees, at least to date, have not taken direct issue. They have, instead, emphasized three arguments upon which they chiefly ground their claim that immediate distribution of the impounded funds must be made to them. Each argument is unsound.

1. *The Secretary's order will not be retroactive.*—Appellees insist that the Secretary of Agriculture has no power to make a retroactive rate order, and that the order to be made in further proceedings before the Secretary must necessarily be retroactive because it will fix rates for a period between June 14, 1933, and November 1, 1937. This argument is built about the provision in Section 310 of the Packers and Stockyards Act that "after a full hearing * * * the Secretary—(a) May determine and prescribe what will be the just and reasonable rate or charge, * * * to be thereafter observed * * *." It follows, appellees insist, that since there has not yet been a full hearing, the Secretary in the further proceedings before him cannot prescribe rates to be observed in the past.

a. In any proper sense the reconsidered order of the Secretary will not be retroactive. The District Court, if it finds that the Secretary has properly entered a valid order in the further proceedings, will direct distribution of the impounded fund on

the basis of that order. The retrospective effect of the order in such event will be precisely what it would have been if after five years of litigation the Secretary's order had been sustained and the District Court had distributed the impounded fund to the farmers. In either case, the effect is to reach back in time to place the parties where they should have been from the beginning. The ultimate practical effect of the order will be to determine rights to money in escrow—money not owned by appellees, as they claim, but money deposited in court by appellees upon behalf of the farmers from whom they collected it. The reconsideration of the original order will thus make possible the proper distribution of a fund which came into existence only because of the original rate proceeding and which cannot justly be disposed of until that proceeding has been terminated on the merits.

b. Appellees' argument, in short, mistakes the character of a "retroactive" order. Such an order, of course, is one which imposes liability without notice for conduct which has already occurred. If there be notice of the rule before the transactions take place, the liability cannot be escaped by attacking the rule as retroactive. Thus, past transactions may be taxed if the taxpayer at the time knew he was subject to some tax.[13] *Milliken* v.

[13] For this reason, and perhaps for the additional reason that the ordinary man would not have been deterred from entering a profitable transaction because of a foreknowledge that the net income would be taxed, the retroactivity of

United States, 283 U. S. 15; *United States* v. *Hudson,* 299 U. S. 498, 501. Similarly, acts of executive officers which may have been invalid because of an improper delegation of legislative authority may, after the event, be validated by legislative ratification. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302, and cases cited. The ground of these decisions is that none can complain of surprise or oppression if, having notice of the rule of conduct, the defects in the prescription of the rule are cured after the transaction has occurred. True, there has been a retroactive removal of a ground upon which the rule might be challenged, but of this none can complain. As this Court said in *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429–430:

> * * * a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Govern-

---

income taxes have uniformly been sustained. *Stockdale* v. *Insurance Cos.,* 20 Wall. 323, 331–332, 341; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Cooper* v. *United States,* 280 U. S. 409.

> ment, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. "The power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Charlotte Harbor & Northern Railway Company* v. *Welles, supra.* * * *

Those principles are fully applicable here, where there have been "mistakes and defects in the administration of government," and where they may be cured after the event in order "that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." In the ratification cases, only Congress could supply the cure, but here the Secretary of Agriculture himself can right the wrong. In neither case is there any forbidden retroactivity.

c. The dispute between the parties turns largely upon terminology. If the further proceeding before the Secretary is viewed as a *new* rate proceeding, Section 310 of course prevents the order which is to be entered from having any effect upon prior transactions. But this view cannot be accepted. The further proceedings are merely ancillary to the initial proceedings and to this Court's invalidation of the order, and are designed to determine whether, or the extent to which, appellees were prejudiced by the procedural error.

The Secretary's order was held invalid because of the failure to serve a tentative report or sufficiently to define the issues to which the appellees' argument and objections could be addressed. Since the Court did not examine the merits, it cannot at this juncture be known whether or not the appellees were in fact prejudiced by this procedural defect. Prejudiced they certainly were, in the sense that the order could not be known to be correct until tested by a determination made under correct procedure. But, as we have earlier shown, the ultimate question is whether the Secretary's order correctly defines the substantive duty laid upon appellees by Section 305. If it does, the failure to accord them what this Court has defined as an essential part of a full hearing resulted in no substantive prejudice.

The further proceedings before the Secretary will permit an even fuller exploration of the substantive questions involved than occurred on the first hearing, for the appellees will have ample opportunity to direct their arguments to specific findings. The Secretary, accordingly, will have before him everything which permits determination of the substantive issues of the case. His amended findings and order will serve to show whether, or to what extent, appellees were prejudiced by the invalidity of the initial proceeding. This determination will be subject to review by the courts. When a final answer has been reached on the merits, and only

then, will the extent of the substantive prejudice to appellees be known.

The question is basically identical to that presented whenever the appellate court considers what action it should take because of the procedural error of a lower court. If the error is plainly nonprejudicial and inconsequential to the decision on the merits, the court, of course, will not reverse. Judicial Code, Section 269 (U. S. C., Title 28, Sec. 391). But if the error is of a serious character, as here, the appellate court will not speculate as to the extent to which it influenced the decision on the merits. Without considering whether, in the final analysis, the actual judgment below was right or wrong, the case will be sent back for further proceedings under a correct procedure.[14] Only when measured by this pragmatic test can the extent of prejudice from the procedural error be measured.

The principle is peculiarly applicable to proceedings before an administrative tribunal. This Court, it is conceivable, could have examined the merits on the prior appeal of this case. But, since it looks only to see if there was evidence to support the Secretary's order, it could not accurately tell whether or to what extent the Secretary's order was influenced by his procedural error. This

---

[14] Even if called a "new trial," the further proceedings are not subject to the disabilities attending a suit instituted after the remand. If the statute of limitations had run, for example, during the original action, the new trial after reversal would not be barred.

Court properly, therefore, declined to consider the merits. The further consideration of the Secretary, under a correct procedure, will show the precise amount of prejudice resulting from the earlier procedural error. Viewed in this light, the Secretary's further action cannot at all be considered a *new* rate proceeding. It is merely a continuation of the old proceeding, in order to make an inquiry which is ancillary to the procedural decision of this Court. Thus, a form of a full hearing in intended compliance with Section 310 has already been had. True, it was an erroneous form. The further proceedings will demonstrate whether or to what extent this error influenced the final result. But this inquiry is quite plainly not the *initiation* of a rate proceeding, and Section 310 contains no bar to the determination of the ownership of the impounded funds on the basis of the reconsidered order.

d. Finally, it should be noted that this Court in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, gave a retroactive force to the second order of the Commission. The section under which the Interstate Commerce Commission acted contained provisions identical, in this respect, to the statute at bar.[15]

---

[15] Section 13 (4) of the Interstate Commerce Act (c. 104, 24 Stat. 383, as amended; U. S. C., Title 49, Sec. 13 (4)) provides that "the commission, *after full hearing*, * * * shall prescribe the rate * * * *thereafter to be observed*, in such manner as * * * will remove such * * * discrimination." [Italics added.]

This Court recognized that "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past" (p. 311), but found in that provision no bar to recognizing the basic mandate of the statute forbidding unjust discrimination against interstate commerce, and no prohibition against curing an order which was invalid because of procedural defects.[16]

2. *The terms of the impounding order do not compel immediate distribution.*—Appellees make a further argument for immediate distribution of the funds which is based upon the provision of the impounding order (R. 130) that the funds shall be held "pending final disposition of this cause." We think it clear that this argument cannot be accepted.

In the first place, if the Secretary is empowered to correct the procedural error, there can be no final disposition of the cause until this has been done. Further proceedings before him are in continuation of the same proceeding, and are not the institution of a new rate proceeding. In consequence, there has not yet been any final disposition of the cause.

---

[16] Similarly, as we have pointed out above (*supra*, p. 50), the New York statute which gave rise to *New York Edison Co.* v. *Maltbie*, 244 App. Div. 436, 279 N. Y. S. 949, and *Brooklyn Union Gas Co.* v. *Maltbie*, 245 App. Div. 74, 281 N. Y. S. 233, contained provisions not substantially different from those here involved, and yet the court found no obstacle to granting substantially the same relief as here asked.

Moreover, the order provides (R. 130) that the amounts deposited shall be accompanied by "a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner." This plainly has reference to the farmers, and their equitable title or claim cannot be swept away so long as there is no judicial decision that the Secretary was wrong in determining that appellees' rates were unreasonable and that the rates prescribed by the order of June 14, 1933, were reasonable and just. Until that determination should be proved wrong, the impounded funds remain moneys collected "on behalf" of the farmers.

Indeed, appellees' argument as to the precise connotations of the words of the impounding order would seem beside the point. The question is not the construction of a contract between business men but the construction of an order of a court of equity, entered in the course of administering a regulatory statute of Congress. If that statute contemplates, as it plainly does, that substantive justice should be done, a court of equity must be taken to have framed its decree in a manner designed to accomplish the statutory purpose. Any ambiguity must therefore be resolved in a way to protect and not to defeat the substantive rights of the parties.[17]

[17] It is for this reason that we attach no significance to appellees' suggestion that the District Court could have entered a restraining order without any impounding provision what-

3. *The distinction between procedural and substantive error.*—Appellees have suggested that our basic premise, that substantive rights should not be concluded by procedural error, is mistaken because there is no distinction between procedural and substantive error.

The suggestion is contradicted by the legal thought of many centuries. The "merits" of any litigation is the issue which provoked the proceedings; the "procedure" is the mechanism by which the issue is reached and decided. This basic postulate is equally applicable to judicial review of administrative agencies, even though the review be by injunction. The ultimate issue before the reviewing court may well be only whether or not the Secretary has acted arbitrarily. But the action may be taken to be arbitrary either because of mistakes of substance, as to what are just and reasonable rates, or because of mistakes of procedure, as to what constitutes a full hearing. It is our contention that, until decision is reached as to the Secretary's action in prescribing the challenged rates, no decision as to his action in defining the

---

ever. This undoubtedly lies within its general equity powers, just as does its power to deny the restraining order entirely. See Section 316 of the Packers and Stockyards Act and Section 208 of the Judicial Code (U. S. C., Title 28, Sec. 46). But any suggestion that the Court enjoin enforcement of the Secretary's order during the course of the litigation, without provision for impounding, would undoubtedly be rejected out of hand as calling for an abuse of the Court's powers.

procedure contemplated by the statute should conclude the cause.

There is no occasion to elaborate upon this most rudimentary of legal distinctions. The Court itself, in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, has removed the matter from controversy. There the failure of the Interstate Commerce Commission to make the requisite findings of fact was, under an identical system of judicial review, described as a defect in form (p. 311), a slip of procedure (p. 312), a part of procedural entanglements (p. 313), a blunder of procedure (p. 315), and as a procedural mistake (p. 316).

As has been shown, the initial question is whether the procedural error has prejudiced the substantive result; even where it probably has, the Secretary clearly has power to correct the error (*supra*, pp. 64-67). We believe, moreover, that a procedure similar to that for which we now contend would be equally applicable to errors of substance, so long as they were of such a character that the order of the Secretary might yet be corrected, such as error in the admission or rejection of evidence.

F. SOUND GOVERNMENT REQUIRES THAT COURTS AND ADMINISTRATIVE AGENCIES COOPERATE TO SECURE BOTH PROCEDURAL AND SUBSTANTIVE RIGHTS

No discussion of the issues presented by this case would be complete without explicitly directing attention to the broader issues of administrative law and governmental operation which may hinge upon or be affected by the decision here. That decision,

it seems clear enough, will be one of importance both to the federal administrative agencies and to the federal courts.

The importance to the administrative tribunals, or at least to those which are subject to collateral rather than direct judicial review, is plain. Any rule which extended immunity from regulation, if only the administrative agency could be convicted of procedural error, would immeasurably increase its burdens. Few persons against whom administrative proceedings are instituted are anxious to submit to regulation. If appellees' position were sustained by this Court, the result could only be to offer a high reward for dilatory tactics, procedural entanglements, and a continuing recalcitrance toward the administrative process. The administrative tribunal would often be forced to accede to the most far-fetched demand of ingenious counsel, for fear of the possibility, however remote, that if the request were denied the whole fruit of the proceeding might be lost, perhaps years later, because the courts would view the demand as justified. The administrative agency might properly feel that the procedure suggested by counsel was patently unsound; but, in the present uncrystallized state of administrative procedure, it would require a bold tribunal to be willing to risk the substantive results of the proceeding upon any procedural point.

We cannot emphasize too strongly that we have no disposition in any manner to weaken the pro-

cedural safeguards of persons appearing in administrative hearings. The increased particularity of the more recent decisions of this Court, for example, we welcome as a salutary influence in formulating the standards of administrative procedure. But we wish, with equal emphasis, to suggest that this guidance can be given without disruption of the administrative process. The administrative tribunal, as the inferior court, may often make mistakes. But it, equally with the court, is anxious to correct its errors and to do justice. It is entitled to the same consideration, and to the same opportunity to correct procedural error without prejudice to the substantive ends of the proceeding, as is the inferior court.

A proper development of administrative procedure requires that too heavy a penalty not be placed upon procedural error. Administrative agencies will hesitate to adopt procedural standards, and courts will be reluctant to formulate canons of procedure, if the price of departure will be a sacrifice of the substantive end of the proceeding. Only when procedural safeguards and substantive rights are viewed as wholly consistent each with the other can either develop properly.

It may be, if the courts' supervision of administrative procedure should impose obstacles too serious for effective administration, that Congress can provide the remedy. This is not a solution to be welcomed. The problems of a just and effective

procedure are too numerous and too varied effectively to be handled by legislation. Of this the history of judicial procedure provides ample documentation. For almost a century the amelioration of the common law proceure has been sought by means of statute. The civil codes, however, have become notoriously complicated and inflexible. The whole thought of the present generation, as notably exemplified by the Federal Rules of Civil Procedure, is to leave to the courts the means by which to work out the procedural problems which harass the course of justice. The flexibility and adaptability which arise in this manner are especially necessary with respect to the review of an administrative tribunal, where the procedure must be less formalized than in judicial proceedings. There would be a serious retrogression if, in place of the broad provisions for procedure and judicial review, Congress were forced by too harsh an attitude on the part of the courts minutely to prescribe the character of procedure for the administrative tribunals and the consequences of departure therefrom.

This, in turn, suggests the importance to the courts themselves that the administrative tribunal be given an opportunity to correct its mistakes of procedure. The administrative agency is already a permanent part of contemporary government. The work of the federal courts must increasingly be concerned with matters which originate before an

administrative tribunal. This aspect of the governmental process is necessarily a cooperative undertaking of the courts and the administrative agency. It can successfully be performed only in a spirit of cooperation. If the courts were to regard the administrative agency as deserving of discipline rather than assistance, if the administrative agency were to regard the courts as intermeddlers seeking to frustrate the administrative process, an intolerable situation would shortly grow up. The specialized competenee of the administrative tribunal offers great assistance to the judicial process; the broad background of judicial experience offers an invaluable guide to the administrative determination. See Landis, *Administrative Policies and the Courts,* 47 Yale Law J. 519. Those benefits might largely be lost if the court and the administrative agency were to regard each other as things apart. And we can think of few decisions which would do more to destroy the indispensable cooperative assistanee of the courts and the administrative tribunals than would an acceptance of appellees' position. No administrative agency could welcome judicial review if it, in contrast to an inferior court, was to be penalized for a procedural error by an irretrievable reversal on the merits as well.

These considerations become doubly compelling when it is considered that Congress has, in Section

305 of the Packers and Stockyards Act, affirmatively declared that all rates shall be just, reasonable, and nondiscriminatory. Unless there be error in the Secretary's determination, this Court should not extend appellees the substantive immunity which they seek. Neither the statute nor good government contemplates ends so divergent between the courts and the Secretary. We cannot state our position half so well as was done by the Court itself in *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 312, 314, 316:

> Unjust discrimination * * * does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. * * * To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. * * * A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision and order of the court below should be reversed and the cause remanded with directions to the District Court to hold the impounded funds until the Secretary of Agriculture shall have concluded the further proceedings

before him and have determined a rate which should govern the distribution of the funds.

ROBERT H. JACKSON,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

WENDELL BERGE,
M. S. HUBERMAN,
BRUNSON MACCHESNEY,
Special Assistants to the Attorney General.

WARNER W. GARDNER,
SMITH K. BRITTINGHAM, Jr.,
Special Attorneys.

OCTOBER 1938.

101391—38——6

APPENDIX A

PACKERS AND STOCKYARDS ACT OF 1921, AS AMENDED

(7 U. S. C., c. 9, Sections 181–229; c. 64, 42 Stat. 159, et seq.)

TITLE III—STOCKYARDS

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep,

swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

MICROCARD 22

TRADE MARK ®

MICROCARD® EDITIONS, INC.
PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037 PHONE (202) 333-6393

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at

[1] Amended by an act of Congress approved May 5, 1926.

such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge,

the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and, pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or

different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of

the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done, he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of

in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates

or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice

thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or

restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE SECTRETARY OF AGRICULTURE

Bureau of Animal Industry Docket No. 311

SECRETARY OF AGRICULTURE *v.* . B. ANDREWS ET AL., RESPONDENTS	Opinion on Motions

I have given careful consideration to the several otions filed by the respondents in the above-entled cause. My conclusions with reference to the isposition of the motions are set forth below.

(1) On April 25, 1938, the Supreme Court found at the proceedings which terminated in my order f June 14, 1933, fixing reasonable rates and harges, were fatally defective because the proosed findings had not been made available to reondents at any time prior to the final argument. n an effort to correct this defect, I entered an rder on June 2, 1938, reopening the proceeding nd directed that "the Proceedings, Findings of act, Conclusion and Order" as issued by me on une 14, 1933, be served upon respondents as the ntative findings of fact, conclusion and order in is proceeding, and directed that respondents be ven 30 days in which to file exceptions to the tentive finding of fact, tentative conclusion and roposed order and in which to make any appropiate motions or objections with respect to fur-

ther proceedings in this case. At respondent's request this time was subsequently extended to August 15, 1938.

(2) On June 30, 1938, respondents moved to vacate the order reopening the proceeding on several grounds. It was first urged that the Packers and Stockyards Act in so far as it vested rate-making power in the Secretary of Agriculture is unconstitutional because it does not provide an impartial trier of the facts, the Secretary and other officials of the Department necessarily being partial and favorable to the owners and shippers of livestock and biased against the interests of the commission men. It was further urged that the present Secretary of Agriculture could not be an impartial trier of the facts because he had prejudged the case in favor of the shippers and that the subordinate officials in the Department were under a like disability. It was also urged that the proceeding was reopened not for the purpose of according respondents a full, fair and open hearing but for the sole purpose of validating the order of June 14, 1933, and of awarding reparation to shippers who have not petitioned therefor. And it was further urged that the manner in which the Secretary had reopened the proceeding had deprived the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933.

(3) On August 15, 1938, the respondents made a further motion to vacate the "Order Reopening Proceeding" questioning both the constitutional and statutory power of the Secretary to proceed with the hearing and questioning the propriety of

the Secretary using the tentative findings of fact, conclusion and proposed order as the basis of a further hearing in the proceeding on the ground that they were not prepared in accordance with the rules of practice of the Department. As a part of the same motion respondents moved that in the event that the "Order Reopening Proceeding" was not vacated, the tentative findings should be stricken out of the proceedings and the respondents permitted to offer to an Examiner designated by the Secretary stated evidence bearing upon the reasonableness of the rates to be fixed for the period subsequent to June 14, 1933.

(4) On August 13, 1938, the New Amsterdam Casualty Company, which has been substituted as respondent for Harry J. Kennaley, doing business as the Harry Kennaley Commission Company, moved to vacate the order of June 2, 1938, on the ground that the death of Harry J. Kennaley made it impossible to accord said Kennaley a full hearing and thus cure the prior error. By an additional motion, the New Amsterdam Casualty Company raises questions of constitutional and statutory authority similar to those raised in the above motions.

(5) Many of the issues raised by respondents' motions are of a character that may be more appropriately dealt with at the close of the hearing without prejudice to respondents' rights. A number of the issues raised have been argued in the District Court and an appeal thereon is pending in the Supreme Court. It may be doubted whether an administrative official has power to pass on some of the questions raised, particularly those of con-

stitutional authority. Certainly the issues raised by respondents are not so clear as to convince me that it would be futile to continue this proceeding. I shall, therefore, not vacate the "Order Reopening Proceeding" but shall continue the proceeding reserving to respondents the right to renew their motions at a later stage when the nature and extent of the issues have become more clearly defined.

(6) There are, however, two points raised by respondents' motions which I think I should deal with now. The first relates to the motion to disqualify me for bias and prejudice. I refer now to those parts of respondents' motion which relate to me personally, and to the affidavit of bias and prejudice filed by their counsel. I am not referring to the rather novel suggestion of respondents that the entire staff of the Department of Agriculture is disqualified from acting.

After careful and serious consideration I have determined that I should not disqualify myself as a matter of law or as a matter of expediency. I might possibly have reached a contrary conclusion as a matter of expediency, were it not for the fact that respondents in filing their exceptions to the tentative findings of fact "deny that any authority to hold hearings or determine issues as herein presented is extended by the Packers and Stockyards Act, 1921, to any person other than the Secretary of Agriculture himself." In the circumstances of this case I can not and I will not shirk the grave responsibility placed upon me by Congress to determine reasonable rates for services to farmers.

This proceeding first came before me at the very beginning of my incumbency of the post of Secretary of Agriculture. I attempted to follow the

established practice and procedure of the Department. I was new at my job but I tried to fulfill it as conscientiously as I could with the knowledge that I then had. Soon after coming into office I put into effect the practice of serving a report with opportunity to the respondents to file and be heard on exceptions to the report. Immediately after the Supreme Court in May, 1936, pointed out that it would have been better practice to submit a report to the parties and hear argument on their exceptions I adopted rules of practice specifically providing for this procedure. And I certainly never said or wrote anything which reflected upon the wisdom of the Supreme Court's suggestion.

The respondents have based their charge of bias and prejudice upon certain statements made by me shortly after the decision of the Supreme Court on the second appeal on April 25 last. And they assert those statements indicate that I have prejudged the case against them.

I deeply regret if any of my remarks taken out of their context gave them any such impression. I did criticise the opinion of the Court before I was advised of the possibility of my reopening the case and thereby avoiding the release of the impounded funds without regard to the substantive rights of the parties. But in reopening this case I shall have no power to judge or to alter the mandate of the Supreme Court. I must endeavor to conduct this proceeding in a manner consistent with the mandate of the Supreme Court and if I err, my action will be subject to correction ultimately by that Court. In criticising rightly or wrongly the opinion of the Supreme Court, I can scarcely be said to have prejudged the action that

I may take in this proceeding which, if it is to stand, must of necessity be consistent with that opinion.

I did make the statement that the effect of the Supreme Court's decision was to give to the commission men several hundred thousand dollars which rightly belonged to the farmer. I am no lawyer. I read the decision of the Supreme Court of April 25th and I thought it meant what the respondents claimed—that the impounded funds were to be released to the commission men. It seemed to me that, since the Supreme Court had expressed no opinion upon the merits, the farmers on the record had a much better claim to the impounded funds than did the commission men. However serious the defects found in the proceeding before me, the District Court which had reviewed my findings on the merits, had upheld them. In other words, I had found certain rates to be reasonable and the only court passing on their reasonableness had upheld my finding. Under those circumstances, I saw no ground for giving the impounded excess to the commission men without regard to the merits. And I think that is all that my words that the money belonged to the farmers could be interpreted to mean. I know that is all that I intended them to mean.

On the facts as I then knew them and without any further proceedings, I thought that the farmers had a better claim to the money than the commission men and that it was unfair to give the money directly to the commission men. I still think so. Again I say that that is all I intended my words to mean.

In petitioning for a rehearing before the Supreme Court, the Solicitor General took the position

that the Court had not decided but ought to decide how the excess funds should be disposed of. The Court denied the rehearing, but stated that the questions raised by the Solicitor General were appropriately for the District Court, to which the case was remanded for further proceedings. The Supreme Court indicated that what further proceedings the Secretary may see fit to take in light of its decision and what determinations may be made by the District Court in relation to any such proceedings were matters which it (the Supreme Court) would not attempt to forecast.

These statements of the Supreme Court led me to believe that I had been too hasty in my conclusion that the effect of its decision was to turn over the impounded funds to the commission men without regard to the merits and that I was not without power to correct the procedural error of which the Court had found me guilty.

Whatever may have been my findings on the basis of the prior hearing, I see no reason why I cannot as fairly and as impartially conduct further proceedings consistent with the opinion of the Supreme Court as any other inferior court whose action has been reversed by an appellate court. I, naturally, thought my original decision was correct at the time. But I have never said or intended to say that upon a further hearing with a new procedure or with the benefit of fresh argument or new evidence I could not or would not change my findings. In view of the defect found in my previous procedure and with the knowledge that my conduct of this proceeding will be most carefully scrutinized, I have every reason to guard against any possible error of procedure or of judgment. My

concern is not to vindicate my past judgment, but to see that the substantive rights of the parties are fairly determined.

(7) There is a further point raised by the respondents' motions which I think I ought to deal with now. The respondents contend that the tentative findings should be withdrawn because they are predicated wholly upon a stale record and that I should designate an examiner to hear stated evidence bearing upon the reasonableness of the rates to be fixed for the period subsequent to June 14, 1933. In support of their contention, counsel for respondents has filed an affidavit as to changed conditions since the date of that order.

The tentative findings were adopted by me after a careful study of the record and I think that at this stage the proceeding will be expedited by a consideration of these findings in light of the exceptions to them which the respondents have already filed. The findings show respondents' operations for the period just prior to the order of June 14, 1933, and will, I believe, prove very helpful as a working basis for this hearing.

On the other hand, I have never had any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933. In reopening the proceeding, I expressly gave them time in which to make any appropriate motions or objections with respect to further proceedings in this case. At the prior hearing we were obliged to consider forecasts of conditions which can now be checked in light of subsequent events. I shall accordingly designate an examiner to hear such

further evidence as he may find material and relevant in regard to conditions subsequent to June 14, 1933, which affect the reasonableness of the rates to be fixed by the Secretary. The examiner will consider the tentative findings in light of the exceptions taken thereto and the new evidence adduced, and may revise such findings or substitute or add such new findings as he may find necessary or appropriate. What weight will be given to the new evidence, and what to the old, must be determined as the hearing progresses. The respondents will be given an opportunity to make exceptions to such revised and new findings as the examiner may make before I hear final arguments on the case.

In accordance with the views herein expressed, an examiner will be appointed for the purpose of allowing the respondents opportunity to submit such additional relevant and material data as they may desire with reference to conditions subsequent to June 14, 1933.

The respondents may file exceptions to any part of this opinion within 30 days so that any considerations overlooked by me may be brought to my attention before final decision of the cause.

(Signed) H. A. WALLACE,
Secretary of Agriculture.

AUGUST 26, 1938.

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

Bureau of Animal Industry

Docket No. 311

SECRETARY OF AGRICULTURE *v.* L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVESTOCK COMMISSION COMPANY, ET AL., MARKET AGENCIES, DOING BUSINESS AT THE KANSAS CITY STOCKYARD, KANSAS CITY, MISSOURI, RESPONDENTS	Order for Taking Additional Evidence

WHEREAS, respondents, on August 15, 1938, filed a motion in the above-entitled cause praying that the Secretary of Agriculture designate an examiner to hear evidence which respondents desire the opportunity to offer through the testimony of witnesses, and by other proper means;

IT IS THEREFORE ORDERED that John C. Brooke, Esq., be and he is hereby designated as examiner for the purpose of taking such additional relevant and material evidence as the parties in this proceeding may desire to offer with respect to conditions subsequent to June 14, 1933;

AND IT IS FURTHER ORDERED that before the taking of such evidence the examiner shall hear the parties with respect to the exceptions filed by them to

the tentative findings of fact served in accordance with the order of the Secretary of June 2, 1938;

AND IT IS FURTHER ORDERED that after hearing argument and the additional evidence the examiner shall prepare and submit to the parties a report in accordance with the rules of practice promulgated by the Secretary of Agriculture governing proceedings under the Packers and Stockyards Act, 1921, as amended;

AND IT IS FURTHER ORDERED that said hearing shall begin at ten o'clock a. m. on September 12, 1938, in Room 201, Administration Building, United States Department of Agriculture, Washington, D. C., and at such other times and places as the examiner may direct;

AND IT IS FURTHER ORDERED that a copy of this order be served upon the parties by registered mail.

IN WITNESS WHEREOF, the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 26th day of August 1938.

(Signed) H. A. WALLACE,
Secretary of Agriculture.

U. S. GOVERNMENT PRINTING OFFICE: 1938